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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 172

JERRY SPAGNUOLO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The amended opinion of the circuit court of appeals (R. 68-72) has not yet been reported.¹

¹To the original opinion issued by the circuit court of appeals there was appended a concurring opinion by Judge Frank, to which the present petition makes reference (Pet. 1, 8). Judge Frank thought that one sentence in the majority opinion unnecessarily relaxed the standards governing admission of evidence for the prosecution. See the original record on file with the Clerk of this Court. The amended opinion of the court below omits both the disputed sentence and the concurring opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered June 23, 1948 (R. 68). The petition for a writ of certiorari was filed July 23, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U.S.C. 1254). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether, in a trial for illegal possession of Scotch whiskey, the court erred in admitting evidence of certain prior transactions involving other Scotch whiskey.

STATUTE INVOLVED

Section 2803 of the Internal Revenue Code, 26 U.S.C. 2803, provides in pertinent part:

(a) *Requirement.* No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

* * * * *

(g) *Penalties.* Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding \$1,000 or by imprisonment at hard labor not exceeding five years, or by both. * * *

STATEMENT

Petitioner was indicted in the District Court for the Southern District of New York for illegal possession of distilled spirits in violation of Section 2803 of the Internal Revenue Code (R. 5). After a jury trial he was convicted and sentenced to six months' imprisonment (R. 58, 62). The judgment was affirmed on appeal² (R. 68).

The evidence for the Government,³ so far as pertinent to the issue raised by the petition, may be summarized as follows:

Howard Johnson testified that on the morning of June 6, 1947, he made a telephone call and ordered some Scotch whiskey (R. 9, 13); that when he walked out of the apartment house in which he lived, between 12:30 and 1:00 p.m., he met petitioner on the street, and petitioner said he had the whiskey for him "inside" (R. 8, 9, 10); that he told petitioner he would have to get the money (R. 10); that he left petitioner waiting in front of the apartment house and walked down the street three blocks to Degenhardt's Bar where, according to previous arrangement, he met two agents of the Alcohol Tax Unit (R. 7, 10); and that he then pointed out petitioner to the agents (R. 10). He also testified that he had first met petitioner the

² On July 13, 1948, Mr. Justice Jackson denied petitioner's application for bail pending action by this Court on the present petition.

³ Petitioner did not take the stand and offered no evidence in his own behalf (R. 52, 53).

previous January; that at that time he bought Scotch whiskey from another man who was with petitioner; that he was given a phone number where he could reach the other man; and that he called that number when he ordered the whiskey on June 6 (R. 11-12, 13). He further testified that he phoned the order on June 6 because of a talk he had two or three days previously with the Alcohol Tax Unit agents regarding Scotch whiskey (R. 13). On cross-examination, Johnson stated that he sold the whiskey he bought in January to the owner of Degenhardt's Bar (R. 16-17); and that he ordered 12 bottles of Scotch on June 6 (R. 18). On redirect examination, he testified that he first met the agents about June 4, 1947, in Degenhardt's Bar; that they then questioned him about the whiskey he had sold to the owner in January; that he told the agents about the telephone number; and that it was as the result of this conversation that he telephoned the order on June 6 (R. 21; cf. R. 13, 24).

The Alcohol Tax Unit agents, Silvers and Kearins, testified that they met the witness Howard Johnson in Degenhardt's Bar on June 4, 1947, as the result of a talk they had with the owner about a bottle of Scotch whiskey (R. 36-37, 44); that they gave Johnson certain instructions and arranged to meet him again on June 6 (R. 37, 44); that they met Johnson about 1:00 p.m. on June 6 and he pointed out petitioner standing in the street (R. 38, 44-45); that after they had observed petitioner

standing there for about an hour they went up to him (R. 38, 45); that one of the agents entered the apartment house and found 12 bottles of alleged Scotch whiskey in the manager's office on the first floor (R. 38-39, 45-49); that the stamps on the bottles were counterfeit (R. 39, 47-48); and that they then arrested petitioner (R. 39, 49). On cross-examination, agent Silvers testified that they had been told by the apartment house manager and by the elevator boy that the packages containing the whiskey had been placed in the office by a white man shortly before noon (R. 42-43). There was other testimony to the effect that the apartment house is inhabited exclusively by Negroes (R. 34), whereas petitioner is a white man.

ARGUMENT

Petitioner contends that the trial court erred in admitting evidence of the January transaction and of the conversation on June 4, 1947, between the agents, Johnson and the owner of Degenhardt's Bar (Pet. 2, 5-7). We find it difficult to perceive any intelligible basis for the contention. On the one hand, petitioner appears to argue that he had no connection with either of the above mentioned transactions and that, therefore, they were irrelevant to the present accusation. On the other hand, he seems to argue that the evidence should have been excluded because it connected him with other separate and distinct criminal acts.

We think it clear that the petition is utterly without merit. The January transaction and the con-

versation of June 4 were obviously relevant. The first linked both Johnson and petitioner with the source of the liquor. The second established Johnson's reason for making the June 6 phone call which resulted in the simultaneous presence of the liquor inside, and of petitioner outside, the apartment house. It is true that the evidence complained of, while not necessarily showing the commission of other crimes by petitioner, created a very strong impression that he had been involved in other transactions. But it is beyond dispute that evidence of other criminal acts is admissible when, as here, it is a part of the *res gestae* and is relevant to show knowledge, identity, plan or intent. *Glasser v. United States*, 315 U.S. 60, 80, 81-82; *Lisenba v. California*, 314 U.S. 219, 227; *Moore v. United States*, 150 U.S. 57, 61; 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 215-218.

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decisions is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1948.